

BEFORE THE FEDERAL ELECTION COMMISSION
OF THE UNITED STATES

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2009 APR -3 P 4:21

TODD P. GRAVES,

Complainant,

vs.

SAM PAGE,

Respondent.

MUR NO. 6099

**WAVERLEY GLEN'S SUPPLEMENTAL
RESPONSE TO COMPLAINT**

This supplement is in response to the Federal Election Commission's ("Commission") letter dated March 16, 2009. The Commission has requested that Waverley Glen, a Prism Medical Company ("Waverley Glen") and Ergosafe Products, L.L.C. ("Ergosafe") provide further explanation and documentation on two issues: (1) that Ergosafe had sufficient U.S. derived funds in its bank account to make a \$10,000 contribution; and (2) that no foreign nationals participated, either directly or indirectly, in the decision to make the contribution.

According to the Commission's Foreign Nationals Brochure ("Brochure"), a domestic subsidiary of a foreign corporation may not donate funds or anything of value to a state or local election if: (1) the contribution is financed by the foreign parent or owner; or (2) individual foreign nationals were involved in any way in the making of the contribution, including participating in donation activity, allocating funds for donations, selecting the recipients of the donation, approving

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the making of the donation, or approving the issuance of the donation check. See Foreign Nationals Brochure, attached hereto as Exhibit A, at p. 2 n.1. If, however, a domestic subsidiary makes a contribution from funds it has generated itself, and the decision to make the contribution was made by only U.S. citizens or permanent residents, then the subsidiary would not be in violation of the Federal Election Campaign Act of 1971 (the "Act"). See Advisory Opinion 1982-10; Advisory Opinion 2006-15; Advisory Opinion 1989-20.

Ergosafe is a domestic subsidiary of its Canadian parent corporations, and has complied with the criteria outlined by the Commission. First, Ergosafe is an established U.S. company. Its 2008 domestic revenues derived from U.S. activities were over \$10 million. Ergosafe's U.S. domestic business has thrived, and as a result, Ergosafe has expanded its workforce and customer base in the United States. Ergosafe's significant U.S. domestic operations were more than sufficient to fund the small amount at issue here, without any assistance or consideration whatsoever from its Canadian parent companies. In addition, Charley Wallace, a U.S. citizen and President of Ergosafe, was the sole person involved in deciding to make this contribution and thereafter executing the contribution.

Thus, Ergosafe is clearly in compliance with the Act, the Brochure and the Advisory Opinions cited above and requests that the Commission resolves this issue without delay.

I. Ergosafe had sufficient funds derived from its U.S. domestic operations to fund this small contribution.

The contribution check was issued in the United States on September 25, 2008, and cleared Ergosafe's U.S. HSBC account on October 7, 2008. See Contribution Check, attached hereto as Exhibit B; HSBC Bank Statement, attached hereto as Exhibit C. The contribution was paid for by funds derived solely from Ergosafe's revenues generated by sales made to U.S. customers. See Sup. Aff. of Charley Wallace, at ¶ 6, attached hereto as Exhibit D

The attached bank statement reflects that Ergosafe received payments of \$238,383.71, \$46,325.33 and \$111,345.76 from a single U.S. customer, Veterans Medical Equipment Sales, LLC, A Service Disabled Veteran Owned Small Business, based in Michigan. See Ex. C; Affidavit, Ex. D, at ¶ 7. The statement also reflects that Ergosafe paid out over \$187,000 to its employees for a two week period. See Ex. C. The balance in this account ranged from \$236,000 to \$568,000 during October and all of these funds were derived solely from Ergosafe's U. S. domestic business operations. See Affidavit, Ex. D, at ¶ 6. In 2008, Ergosafe's U.S. domestic operations generated revenues of over \$10 million. See *id.* at ¶ 8.

Ergosafe's U.S. domestic business operations are substantial, generating revenues from U.S. customers which are clearly much more than sufficient to fund the small contribution at issue. The contribution was thus generated from a U.S. domestic corporation, and therefore, does not violate the Act or the Brochure and is

in agreement with the Advisory Opinions.

II. Charley Wallace was the sole individual involved in deciding to make this contribution.

Charley Wallace made the decision to contribute on behalf of Ergosafe on his own in his capacity as Ergosafe's President in the United States. See Affidavit, Ex. D, at ¶ 4. As President, Mr. Wallace was authorized on his own to make U.S. political contributions on behalf of Ergosafe. *Id.* No other person directly or indirectly participated in the decision-making concerning the contribution. It therefore necessarily follows that no foreign national, from Ergosafe or any other entity, directed, dictated, controlled or in any way participated in this decision to make the donation at issue. See *id.* at ¶ 9-10. In fact, it would be atypical for any officer or director of Ergosafe's parent corporations to be involved in deciding to make such a small expenditure for their U.S. subsidiary and such did not happen here. See *id.* at ¶ 9.

Because Mr. Wallace was the sole decision-maker, without the direct or indirect assistance of any foreign national or any other person for that matter, the contribution does not violate the Act or the Brochure and is in conformity with the FEC's Advisory Opinions on this issue.

III. CONCLUSION

In conclusion, Waverley Glen respectfully requests that the Complaint filed in this cause be dismissed with prejudice and for such other and proper relief as

may be deemed appropriate by the Commission. The instant Supplemental Affidavit and Response have shown beyond any shadow of a doubt that the donation at issue did not in any way violate the Act.

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Foreign Nationals Brochure

Foreign Nationals

Federal Election Commission

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Introduction

The ban on political contributions and expenditures by foreign nationals was first enacted in 1966 as part of the amendments to the Foreign Agents Registration Act (FARA), an "internal security" statute. The goal of the FARA was to minimize foreign intervention in U.S. elections by establishing a series of limitations on foreign nationals. These included registration requirements for the agents of foreign principals and a general prohibition on political contributions by foreign nationals. In 1974, the prohibition was incorporated into the Federal Election Campaign Act (the FECA), giving the Federal Election Commission (FEC) jurisdiction over its enforcement and interpretation.



This brochure has been developed to help clarify the rules regarding the political activity of foreign nationals; however, it is not intended to provide an exhaustive discussion of the election law. If you have any questions after reading this, please contact the FHC in Washington, D.C., at 1-800-424-9530 or 202-694-1100. Members of the press should contact the FEC Press Office at 202-694-1220 or at the toll free number listed above.

Except where otherwise noted, all citations refer to the Act and FEC regulations. Advisory Opinions (AOs) issued by the Commission are also cited.

The Prohibition

The Federal Election Campaign Act (FECA) prohibits any foreign national from contributing, donating or spending funds in connection with any federal, state, or local election in the United States, either directly or indirectly. It is also unlawful to help foreign nationals violate that ban or to solicit, receive or accept contributions or donations from them. Persons who knowingly and willfully engage in these activities may be subject to fines and/or imprisonment.

Foreign Nationals Brochure

Who is a Foreign National?

The following groups and individuals are considered "foreign nationals" and are, therefore, subject to the prohibition:

- Foreign governments;
- Foreign political parties;
- Foreign corporations;
- Foreign associations;
- Foreign partnerships;
- Individuals with foreign citizenship; and
- Immigrants who do not have a "green card."

Individuals: The "Green Card" Exception

An immigrant may make a contribution if he or she has a "green card" indicating his or her lawful admittance for permanent residence in the United States.

Domestic Subsidiaries and Foreign-Owned Corporations

A U.S. subsidiary of a foreign corporation or a U.S. corporation that is owned by foreign nationals may be subject to the prohibition, as discussed below.

PAC Contributions for Federal Activity

A domestic subsidiary of a foreign corporation may not establish a federal political action committee (PAC) to make federal contributions if:

- (1) The foreign parent corporation finances the PAC's establishment, administration, or solicitation costs; or
- (2) Individual foreign nationals:
 - Participate in the operation of the PAC;
 - Serve as officers of the PAC;
 - Participated in the selection of persons who operate the PAC; or
 - Make decisions regarding PAC contributions or expenditure.

11 CFR 110.20(f).

(See also AOs 2000-17, 1995-15, 1990-8, 1989-29, and 1989-20.)

Corporate Contributions for Nonfederal Activity

Additionally, a domestic subsidiary of a foreign corporation (or a domestic corporation owned by foreign nationals) may not donate funds or anything of value in connection with state or local elections if:

- (1) These activities are financed by the foreign parent or owner; or
- (2) Individual foreign nationals are involved in any way in the making of donations to nonfederal candidates and committees. |

| This means that foreign nationals may not participate in donation activity, allocate funds for donations, or make decisions regarding donations (e.g., selecting the recipients, approving the making of donations, or approving the issuance of donation checks).

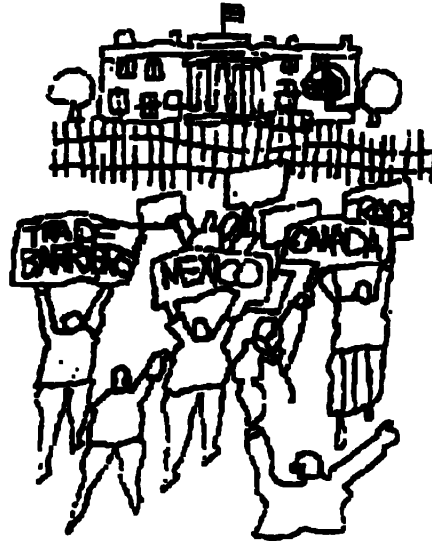
Foreign Nationals Brochure

Please note that many states place additional restrictions on donations made to nonfederal candidates and committees. 11 CFR 110.20(i). (See also AOs 1992-16, 1985-3, 1982-10, and MUR 2892.)

Volunteer Activity

Generally, an individual may volunteer personal services to a federal candidate or federal political committee without making a contribution. The Act provides this volunteer "exemption" as long as the individual performing the service is not compensated by anyone. 11 CFR 100.74. The Commission has addressed applicability of this exemption to volunteer activity by a foreign national, as explained below.

In Advisory Opinion 1987-25, the Commission allowed a foreign national student to provide uncompensated volunteer services to a Presidential campaign. By contrast, the decision in AO 1981-51 prohibited a foreign national artist from donating his services in connection with fundraising for a Senate campaign.²



Nonelection Activity by Foreign Nationals

Despite the general prohibition on foreign national contributions and donations, foreign nationals may lawfully engage in political activity that is not connected with any election to political office at the federal, state, or local levels. The FEC has clarified such activity with respect to individuals' activities.

In Advisory Opinion 1989-32, the Commission concluded that although foreign nationals could make disbursements solely to influence ballot issues, a foreign national could not contribute to a ballot committee that had coordinated its efforts with a nonfederal candidate's re-election campaign.

In Advisory Opinion 1984-41, the Commission allowed a foreign national to underwrite the broadcast of apolitical ads that attempted to expose the alleged political bias of the media. The Commission found that these ads were not election influencing because they did not mention candidates, political offices, political parties, incumbent federal officeholders or any past or future election.³

² The Commission has stated that this opinion is not superseded by AO 1987-25. Individuals may obtain further guidance in this area by requesting an advisory opinion about their proposed activity.

³ Individuals and committees should consider requesting an advisory opinion before engaging in other types of political activity involving foreign nationals.

Foreign Nationals Brochure

Assisting Foreign National Contributions or Donations

Under Commission regulations it is unlawful to knowingly provide substantial assistance to foreign nationals making contributions or donations in connection with any U.S. election. 11 CFR 110.20(b). "Substantial assistance" refers to active involvement in the solicitation, making, receipt or acceptance of a foreign national contribution or donation with the intent of facilitating the successful completion of the transaction. This prohibition includes, but is not limited to individuals who act as conduits or intermediaries. 67 FR 69945-6 (November 19, 2002).

Soliciting, Accepting, or Receiving Contributions and Donations from Foreign Nationals

As noted earlier, the Act prohibits knowingly soliciting, accepting or receiving contributions or donations from foreign nationals. In this context, "knowingly" means that a person:

- Has actual knowledge that the funds solicited, accepted, or received are from a foreign national;
- Is aware of facts that would lead a reasonable person to believe that the funds solicited, accepted, or received are likely to be from a foreign national;
- Is aware of facts that would lead a reasonable person to inquire whether the source of the funds solicited, accepted or received is a foreign national.

11 CFR 110.20 (a)(4) (i), (ii) and (iii).

Pertinent facts that may lead to inquiry by the recipient include, but are not limited to the following: A donor or contributor uses a foreign passport, provides a foreign address, makes a contribution from a foreign bank, or resides abroad. Obtaining a copy of a current and valid U.S. passport would satisfy the duty to inquire whether the funds solicited, accepted, or received are from a foreign national.

11 CFR 110.20(a)(7).

**Monitoring Prohibited Contributions**

When a federal political committee (a committee active in federal elections) receives a contribution it believes may be from a foreign national, it must:

- Return the contribution to the donor without depositing it; or
- Deposit the contribution and take steps to determine its legality, as described below.

Hither action must be taken within 10 days of the treasurer's receipt.

11 CFR 103.3 (b)(1).

Foreign Nationals Brochure

If the committee decides to deposit the contribution, the treasurer must make sure that the funds are not spent because they may have to be refunded. Additionally, he or she must maintain a written record explaining why the contribution may be prohibited.⁴ 11 CFR 103.3 (b)(4) and (5). The legality of the contribution must be confirmed within 30 days of the treasurer's receipt, or the committee must issue a refund.⁵

If the committee deposits a contribution that appears to be legal, but later discovers that the deposited contribution is from a foreign national, it must refund the contribution within 30 days of making the discovery. If a committee lacks sufficient funds to make a refund when a prohibited contribution is discovered, it must use the next funds it receives. 11 CFR 103.3 (b) (1) and (2).

⁴ This information must be included when the receipt of the contribution is reported.

⁵ For example, evidence of legality includes a written statement from the contributor explaining why the contribution is legal (e.g. donor has a green card), or an oral explanation that is recorded in memorandum.